

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JAMES G. FAIRCLOTH

Claimant

V.

EL DORADO NATIONAL KANSAS, INC.

Self-Insured Respondent

Docket No. 1,074,579

ORDER

STATEMENT OF THE CASE

Claimant requested review of the November 5, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Kelly W. Johnston of Kechi, Kansas, appeared for claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for self-insured respondent.

The ALJ found claimant failed to prove the work-related accident of February 24, 2015, was the prevailing factor in causing his injury, medical condition, or disability.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 13, 2015, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues he proved his accident was the prevailing factor causing his injury by a preponderance of the evidence, with special emphasis on the medical opinions of Drs. Peterson and Kossow.

Respondent argues the Board lacks jurisdiction to review claimant's appeal. Further, respondent maintains the ALJ's Order should be affirmed, as claimant failed to meet his burden of proving he has a work-related accidental or repetitive use injury which caused his carpal tunnel syndrome.

The issues for the Board's review are:

1. Does the Board have jurisdiction to review claimant's appeal?

2. Did claimant meet his burden of proving the repetitive trauma, including a traumatic injury on February 24, 2015, was the prevailing factor in causing his injury, medical condition, or disability?

FINDINGS OF FACT

Claimant began working for respondent as a metal worker on approximately October 6, 2014. Claimant's job consisted of cutting steel tubing, ranging up to twenty feet in length and one to four inches in diameter, with a "hot saw."¹ Claimant also performed welding duties.

On February 24, 2015, claimant was handling angle iron when it bucked and impacted his left hand and wrist. Claimant testified he experienced immediate pain in his wrist and forearms, with numbness in his fingers. Claimant reported the incident and was given a brace before he was referred for treatment. Claimant testified he did not wear a brace prior to the accident.²

Claimant treated with Dr. Albert Geisen for various medical issues prior to the accident. On January 2, 2015, claimant complained of left and right forearm and hand pain with numbness with a duration of over three months.³ During his deposition, claimant could not recall providing this information to Dr. Geisen. Claimant later testified at the preliminary hearing he did talk to Dr. Geisen about his hand and forearm complaints, but it was not much of a problem at that time. Dr. Geisen referred claimant to orthopedist Dr. David Peterson.

Dr. Peterson first examined claimant on February 3, 2015. He wrote, "[Claimant] has pain into his wrists left worse than right for many years. Increased pain at night. He does wear a brace that has helped some, but does some stretching and it wakes him up at night."⁴ Claimant denied stating his pain had existed for many years. Dr. Peterson performed a physical examination, which was positive for carpal tunnel syndrome. Dr. Peterson recommended a carpal tunnel release.

Claimant returned to Dr. Peterson on April 9, 2015. Dr. Peterson was informed of the work-related incident and performed another physical examination. He recommended claimant undergo a nerve conduction study. Dr. Peterson did not impose restrictions and released claimant to full duty with the understanding claimant would return to his office

¹ P.H. Trans. at 21.

² See *id.*, Resp. Ex. A at 4 (Cl. Depo. at 9).

³ See P.H. Trans., Cl. Ex. 3 at 48.

⁴ P.H. Trans., Resp. Ex. C at 1.

following testing. Claimant underwent a nerve conduction study with Dr. William Kossow on April 29, 2015. Dr. Kossow concluded the study revealed evidence of moderate left carpal tunnel syndrome.

In a letter dated May 14, 2015, Dr. Peterson was asked to provide opinions related to causation and prevailing factor. Dr. Peterson replied on June 9, 2015:

I feel the continued symptoms are related to the initial injury in February and to his work at [respondent].

I think that the injury of February is the prevailing factor in [claimant's] need for carpal tunnel release. There are no other indications of previous EMGs nerve conduction studies or previous carpal tunnel release surgery.⁵

Claimant continued working for respondent until his termination in July 2015.

PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2014 Supp. 44-508(f) states, in part:

(f)(2)(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

⁵ P.H. Trans., Cl. Ex. 1 at 2.

K.S.A. 2014 Supp. 44-508(g) states:

“Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁷

ANALYSIS

K.S.A. 44-534a(a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues, including accidental injury, injury arising out of and in the course of employment, timely notice, and certain other defenses. The Board has jurisdiction to review this appeal.

Claimant filed an Application for Hearing, Form E-1, with the Division of Workers Compensation on July 23, 2015, alleging a single date of accident, occurring on February 24, 2015. In the description of the injury, claimant describes a repetitive use injury and the event on February 24, 2015. It is evident from the content of the E-1 that claimant intended to pursue benefits for a repetitive use injury.

Claimant first mention of left forearm pain, hand pain and numbness is recorded in Dr. Geissen’s January 2, 2015, clinical note. Dr. Geissen noted a history of pain beginning three months prior to the examination. On February 3, 2015, three weeks prior to claimant’s work-related accident, Dr. Peterson examined claimant and recommended a carpal tunnel release. At that time, Dr. Peterson provided claimant with educational material involving carpal tunnel releases.⁸

It should be noted claimant’s testimony is inconsistent. When claimant was asked at his discovery deposition if he had experienced pain in his left wrist prior to the February 24, 2015, work-related accident, he replied, “None at all.”⁹ At the preliminary hearing,

⁶ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁷ K.S.A. 2014 Supp. 44-555c(j).

⁸ See P.H. Trans., Resp. Ex. C at 1.

⁹ P.H. Trans., Resp. Ex. A at 4 (Cl. Depo. at 11).

claimant testified that in early January 2014 he told Jimmy White, a line supervisor, that he was having trouble controlling his left hand while welding.¹⁰ It is difficult to discern if claimant's inconsistent testimony is the result of confusion or deception. Claimant's testimony at the preliminary hearing is more consistent with the medical records.

On June 9, 2015, Dr. Peterson, in response to a letter from the claims representative, wrote that claimant's symptoms were related to his work-related injury and the work claimant was performing for respondent. He also wrote that the February 24, 2015, work-related injury was the prevailing factor for claimant's need for a carpal tunnel release. Dr. Peterson's opinion is somewhat inconsistent.

Notwithstanding claimant's inconsistent testimony, it is evident from the medical records claimant began having symptoms of left carpal tunnel syndrome after he started working for respondent. Dr. Peterson believes both claimant's work activities and the specific injury caused claimant's carpal tunnel syndrome. Evidence exists to support a finding claimant developed left-sided carpal tunnel syndrome while working for respondent and that the repetitive work activities and traumatic injury are the prevailing factor causing claimant's need for treatment.

CONCLUSION

Claimant has met the burden of proving the February 24, 2015, work-related injury is the prevailing factor causing his need for carpal tunnel surgery.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated November 5, 2015, is reversed and remanded for further proceedings consistent with this order.

IT IS SO ORDERED.

Dated this _____ day of January, 2016.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

¹⁰ See P.H. Trans. at 18-19.

c: Kelly W. Johnston, Attorney for Claimant
shockerjd@jlopa.com
cbrewer@jlopa.com

D. Shane Bangerter, Attorney for Self-Insured Respondent
shane@rbr3.com

Hon. Bruce E. Moore, Administrative Law Judge